STATE OF MICHIGAN

COURT OF APPEALS

JANICE LOCKETT, MARY STEWART, SABRINA ROSS, ANN MARTIN, VIVIAN HATTON, GOLENA COOPER, SHEILA BROADENAX, and MARK JENNINGS, Plaintiffs-Appellants,	UNPUBLISHED January 27, 2004
v UNITED METAL PRODUCTS CORPORATION, Defendant-Appellee.	No. 240889 Wayne Circuit Court LC No. 00-007106-NZ

SONJI MCEWEN, Plaintiff-Appellant,	
v UNITED METAL PRODUCTS CORPORATION, Defendant-Appellee.	No. 240890 Wayne Circuit Court LC No. 00-010857-NZ

Before: Murray, P.J., and Gage and Kelly, JJ.

PER CURIAM.

These consolidated cases involve claims by the various plaintiffs of racial discrimination. In Docket No. 240889, plaintiffs Janice Lockett, Mary Stewart, Sabrina Ross, Ann Martin, Vivian Hatton, Golena Cooper, Sheila Broadenax, and Mark Jennings appeal by right the trial court's order granting summary disposition to defendant and dismissing their case. In Docket No. 240890, plaintiff Sonji McEwen likewise appeals by right the trial court's order granting summary disposition to defendant and dismissing her case. We affirm in both cases.

FACTUAL BACKGROUND

Defendant has been conducting business in Detroit since 1946 and employs approximately fifty employees. With regard to employment status, after employees pass their ninety-day probation period, they become members of the Union and their employment is

governed by the Collective Bargaining Agreement (CBA). It is undisputed that at the time of this lawsuit, defendant had never employed an African American employee as a supervisor or manager, nor had an African American employee ever been employed long enough to retire from defendant's employ.

The collective plaintiffs are all African American and are either current or former employees of defendant. Each plaintiff began his or her employment at a different time ranging from 1983 through 1998. Each claims that from the initiation of employment, African American employees are degraded by supervisors and treated differently than their non-African American counterparts. Plaintiffs complain that each of them has been the subject of racial slurs or been present when racially derogatory remarks were made by white employees or supervisors. They also claim disparate treatment – asserting that African American female employees are timed while using the bathroom facilities but non-African American employees are not, African American employees are prohibited from talking at their workstations but non-African American employees are not, African American employees are disciplined more harshly than non-African American employees, and African American employees are discouraged from applying for higher paying positions.

The collective plaintiffs in Docket No. 240889 filed suit against defendant on March 3, 2000, claiming race and gender discrimination. On June 25, 2001, defendant moved for summary disposition pursuant to MCR 2.116(C)(10). Through awritten opinion on March 15, 2002, the trial court granted defendant's motion. In its opinion, the trial court found that plaintiffs failed to present evidence that they suffered an adverse employment action or were treated differently than non-African Americans for the same or similar conduct, and thus, they failed to present a prima facie case of disparate race discrimination. With regard to plaintiffs' hostile work environment claim, the court first determined that some of the claims fell outside the applicable three-year statute of limitations and thus could not support plaintiffs' claim. The court then found that some of the allegations were generalized statements with no facts presented to support them. Finally, the court found that with regard to the majority of the claims, plaintiffs presented no evidence that they complained to defendant about the incidents, and plaintiffs, therefore, failed to establish vicarious liability. The court concluded that from the few generalized complaints made and the isolated incidents cited by plaintiffs, plaintiffs failed to establish a prima facie case of racial hostile work environment.[1]

Plaintiff Sonji McEwen filed her complaint alleging retaliation and race discrimination. Defendant filed a motion for summary disposition on April 19, 2001. By way of written opinion, the trial court granted defendant's motion on March 15, 2002. In its opinion, the court appeared to find that plaintiff McEwen had produced a prima facie case of retaliation and disparate treatment; however, the court then found that plaintiff McEwen failed to produce evidence demonstrating that defendant's reasons for the adverse employment actions were a mere pretext

[1] The trial court also dismissed plaintiffs' allegations of gender discrimination and retaliation; however, on appeal, plaintiffs do not appeal the court's decision in that regard.

for discrimination. The court also found plaintiff McEwen failed to establish a prima facie case for her hostile work environment claim.

STANDARD OF REVIEW

The trial court granted defendant's motions for summary disposition in both cases under MCR 2.116(C)(10). The Court reviews de novo a motion for summary disposition based on MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Motions brought under this court rule test the factual support of a claim. *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 620; 637 NW2d 536 (2001). The moving party has the initial burden of supporting its position with documentary evidence such as affidavits, depositions, admissions or interrogatory responses, and the burden then shifts to the opposing party to establish the existence of a factual dispute. *Id*.; *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). The nonmoving party may not rest on mere allegations or denials, but must, through documentary evidence, set forth specific facts showing a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). All reasonable inferences must be drawn in favor of the nonmoving party. *Hall v McRea Corp*, 238 Mich App 361, 369-370; 605 NW2d 354 (1999).

DOCKET NO. 240889

A

The collective plaintiffs in Docket No. 240889 argue on appeal that the trial court erred in granting defendant summary disposition of the racial hostile work environment claim because plaintiffs produced admissible evidence to establish that they were subjected to severe and pervasive harassment based on race.

The Civil Rights Act (CRA) provides that an employer shall not "fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status." MCL 37.2202(1). Such harassment based on any one of the above classifications is an actionable offense. *Malan v Gen Dynamics Land Systems, Inc*, 212 Mich App 585, 587; 538 NW2d 76 (1995). The phrase "term, condition, or privilege of employment" includes "the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." *Downey v Charlevoix Co Bd of Rd Comm'rs*, 227 Mich App 621, 628; 576 NW2d 712 (1998), citing *Harris v Forklift Systems, Inc*, 510 US 17, 21; 114 S Ct 367; 126 L Ed 2d 295 (1993). To establish a prima facie case of racial hostile work environment, a plaintiff must demonstrate that (1) the employee belonged to a protected group, (2) the employee was subjected to communication or conduct on the basis of race, (3) the employee was subjected to unwelcome racial conduct or communication, (4) the unwelcome conduct was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment, and (5) respondeat superior. *Quinto, supra* at 368-369.

At issue in this case is whether plaintiffs were subject to unwelcome communication or conduct based on their race and whether this conduct created a hostile work environment. The test for determining whether a hostile work environment exists is "whether a reasonable person,

in the totality of circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having a purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Radtke v Everett*, 442 Mich 368, 394; 501 NW2d 155 (1993). While generally a single incident will not create a hostile work environment, a single "extremely traumatic experience" may satisfy the statutory requirement. *Id*. In similar regard, the United States Supreme Court has continuously held that "'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'" and that "conduct must be extreme to amount to a change in the terms and conditions of employment." *Faragher v City of Boca Raton*, 524 US 775, 788; 118 S Ct 2275; 141 L Ed 2d 662 (1998).

Also at issue in this case is whether defendant can be held liable for plaintiffs' hostile work environment claims. With regard to employer liability, in *Chambers v Trettco*, 463 Mich 297, 311; 614 NW2d 910 (2000), the Michigan Supreme Court maintained that "strict imposition of vicarious liability on an employer 'is illogical in a pure hostile environment setting' because, generally, in such a case, 'the supervisor acts outside "the scope of actual or apparent authority to hire, fire, discipline, or promote."'" "Under the Michigan Civil Rights Act, an employer may avoid liability in a hostile environment case 'if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment.'" *Id*. at 312, quoting *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991). Thus, it is clear that an employer must have notice of the alleged harassment before it can be liable for failing to implement action. *Id*. This notice may be actual or constructive. *Sheridan*, *supra* at 621.

> "Where . . . the plaintiff seeks to hold the employer responsible for the hostile environment created by the plaintiff's supervisor or co-worker, she must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action. . . . The employee can demonstrate that the employer knew of the harassment by showing that she complained to higher management of the harassment . . . or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." [*Id*., quoting *McCarthy v State Farm Ins Co*, 170 Mich App 451, 457; 428 NW2d 692 (1988).]

Higher management means someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining the offensive employee. *Sheridan*, *supra* at 622.

While ordinarily there is a three-year statute of limitations to bring forth a hostile work environment claim, MCL 600.5805(9), plaintiffs' claim is brought under what is known as the continuing violation theory. Pursuant to this theory, under certain circumstances, conduct occurring outside the applicable 3-year statute of limitations may be considered. The factors to be considered in determining whether a continuing course of discriminatory conduct existed are (1) subject matter – do the alleged acts involve the same type of discrimination; (2) frequency – are the alleged acts recurring; and (3) the degree of permanence – does the act have the degree of permanence that should trigger the employee's awareness of the duty to assert his or her rights. *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 538; 398 NW2d 368 (1986), quoting *Berry v LSU Bd of Supervisors*, 715 F2d 971, 981 (CA 5, 1983).

Applying the above legal principles, we conclude that plaintiffs failed to establish that they were subject to unwelcome comments or conduct based on race and that this conduct created a hostile work environment. Further, we conclude that defendant did not have proper notice of the claimed comments or conduct, and thus, cannot be held liable.

Plaintiffs do not contend that any one single incident was so traumatic that it, in itself, created a hostile work environment; instead, plaintiffs argue that in the aggregate, all of the racial slurs, comments, and conduct, created a hostile work environment. However, the record demonstrates that plaintiffs failed to complain to management regarding most of the comments or conduct for which they now complain nor did they follow any grievance procedure. Further, none of the conduct appeared so pervasive as to impute knowledge on defendant. Regarding the conduct for which plaintiffs did complain, defendant took prompt action to alleviate the problem.

Plaintiffs complain that female African American employees are timed while using the bathroom facilities and that African American employees are not permitted to talk while at their workstations but non-African American employees are permitted to do so. However, plaintiffs failed to present evidence that any plaintiff complained to management about these practices and defendant took no action or that they filed any grievance. More importantly, plaintiffs failed to identify any African American employee who was disciplined for taking too much time in the bathroom or talking while at their workstation, or any specific non-African American employees who were permitted to use excessive time in the bathroom or talk while at their workstations. In fact, the record demonstrates that the only employee disciplined for wasting time was a white employee. Plaintiffs also complain that on several occasions, African American employees were referred to as "you people" rather than by their names. The record, however, indicates that the statements were made during a meeting at which both African American and non-African American employees were in attendance, and there is nothing to indicate that the comment specifically referred to the African American employees. Further, plaintiffs failed to establish that they filed any grievances and that defendant failed to take action. Plaintiffs also complain that African American employees are discouraged from applying for the higher paying jobs and that only white employees get the higher paying jobs. However, plaintiffs failed to identify any particular instances where an African American employee was openly discouraged from applying for a job or any specific employee who was overlooked for a job in favor of a less qualified non-African American applicant.

Plaintiffs do point to several incidents with coworkers that had severe racial undertones. While we address only some of the incidents here, we find none of the incidents alleged support a claim of hostile work environment. Plaintiffs complain that a white employee stated to plaintiff Broadenax that he was "not going to be his nigger for a day." The record indicates that plaintiff Broadenax complained to management about this comment. However, the record also reflects that defendant required the white employee to apologize for the comment. Plaintiffs complain that a white coworker referred to plaintiff Broadenax as "Aunt Jemimah." However, the record reflects that plaintiff Broadenax did not complain to management about the comment and she admitted that she just "let it go." Plaintiffs complain that in 1994 and 1995, signs reading "White Power" and "God is White" were put up in the common area of the work facilities. However, the record indicates that once complaints were made about the signs, they were removed promptly. Plaintiffs also complain that a supervisor once commented "I knew them niggers didn't have no sense," and that other coworkers have made comments such as "you

look like a black bunny rabbit." Again, there is no indication in the record that plaintiffs ever complained about these comments and that defendant did nothing.

The record demonstrates that while plaintiffs have made subjective observations regarding defendant's alleged preferential treatment of white employees, their observations are merely that, subjective. Plaintiffs provided no evidence that they were subjected to any adverse employment decisions based on race. Plaintiffs have no record of complaints made to management and management's failure to act. While a fellow employee's derogatory comments can create an uncomfortable work environment, an employer cannot be held liable for discrimination if it was unaware of the conduct.

None of plaintiffs' claims were so offensive as to warrant a finding of racially hostile work environment on a single claim alone. Those few incidents that were complained about, even in the aggregate viewing all plaintiffs, do not rise to a claim of a racially hostile work environment. Thus, the trial court properly granted summary disposition to defendant with regard to this claim.

B

Plaintiffs also argue on appeal that the trial court erred in granting summary disposition to defendant with regard to the discrimination claim because plaintiffs produced admissible evidence to establish disparate treatment in the workplace based on race.

To prove disparate treatment, a plaintiff must show that the plaintiff was a member of the class entitled to protection and that he was treated differently than persons of a different class for the same or similar conduct. *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997). Proof of discriminatory treatment in violation of the CRA may be established by direct evidence or by indirect circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003)(citations omitted). Plaintiffs claim that the complained-of racial slurs are direct evidence of discrimination and that the other conduct exhibited by defendant and its employees can be interpreted as indirect evidence to support their claim.

In cases involving direct evidence of discrimination, a plaintiff may prove discrimination in the same manner as a plaintiff would prove any other civil case. *Id.*, citing *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). Where the adverse employment decision could have been based on both legitimate and legally impermissible reasons, the plaintiff must prove that the defendant's "discriminatory animus was more likely than not a 'substantial' or 'motivating' factor in the decision." *Sniecinski*, *supra* at 133 (citations omitted). In addition, the plaintiff must establish that she was qualified for the position sought and present direct proof that the discriminatory animus was "causally related to the adverse decision." *Id.*, citing *Harrison v Olde Financial Corp*, 225 Mich App 601, 612-613; 572 NW2d 579 (1997).

In cases involving indirect or circumstantial evidence, the plaintiff must proceed using the burden shifting approach set forth in *McDonnel Douglass Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski*, *supra* at 134 (citations omitted). To establish a rebuttable prima facie case of discrimination under this approach, the plaintiff must present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment

decision, (3) she was qualified for the position, and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Id*.; *Hazle, supra*; *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). Once the plaintiff presents a prima facie case of discrimination, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id*. If the defendant presents such evidence, the burden shifts back to the plaintiff to show that the defendant's reasons were a mere pretext for discrimination. *Id.*

Plaintiffs claim that their being forced to work in a hostile work environment constitutes an adverse employment action. However, defendant has vehemently argued throughout this case that plaintiffs have not established that they suffered an adverse employment action. In the context of a discrimination claim, an adverse employment action (1) must be materially adverse in that it is more than "mere inconvenience or an alteration of job responsibilities," and (2) must have an objective basis for demonstrating that the change is adverse, rather than the mere subjective impressions of the plaintiff. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 365; 597 NW2d 250 (1999). While adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action. See *Lytle, supra* at 173.

In this case, it is undisputed that none of the plaintiffs were fired from their positions because of the complained-of conduct. Plaintiffs' claims of disparate treatment are based only on their allegations that plaintiffs are treated differently than their non-African American counterparts. Plaintiffs claim that this case tests whether "the qualitative experience of work described by plaintiffs can constitute an 'adverse employment action' for purposes of establishing a claim for discrimination based on race." The trial court determined that none of the complained-of conduct constituted adverse employment actions, and even if they did, plaintiffs failed to demonstrate that they were treated differently than their non-African American counterparts for the same or similar conduct. We agree.

While plaintiffs complain that their forced toleration of racial comments from white coworkers and supervisors constitutes an adverse employment action, we disagree. Disparate treatment and hostile work environment are two separate claims. In this case, plaintiffs have presented a prima facie case of neither. Plaintiffs failed to produce evidence that they suffered an adverse employment action. Again, none of the plaintiffs complain that they were fired from their positions or demoted. More importantly, however, plaintiffs failed to produce evidence that they were treated differently than their white counterparts. Plaintiffs produced no evidence in the form of times, dates, or names, concerning when they were disciplined for using the bathroom excessively or for talking while at their workstations but white employees were not. Further, with regard to African American employees being discouraged for applying for the higher paying positions, plaintiffs failed to present evidence that defendant did not follow the Collective Bargaining Agreement in posting available positions and filling them. In most instances, each plaintiff admitted that any position he or she applied for that they did not get was

filled by a more senior employee.[2] In essence, plaintiffs failed to support their claims with any evidence.

Either through direct or circumstantial evidence, plaintiffs failed to demonstrate that they were treated differently from their non-African American counterparts for the same or similar conduct. Disparate treatment requires that the plaintiff show that she suffered some form of adverse employment action that other similarly situated employees did not suffer simply because of their race. Here, beyond their mere subjective interpretations of their work environment, plaintiffs have not provided evidence to support their claims. Therefore, the trial court correctly granted summary disposition.

DOCKET NO. 240890

A

Plaintiff McEwen first argues on appeal that the trial court erred in granting defendant summary disposition with regard to plaintiff McEwen's retaliation claim. Defendant hired plaintiff McEwen in February 1998. As with all employees, plaintiff McEwen was required to go through a 90-day probationary period before becoming a full-time employee and union member. McEwen alleged that during her initial probationary period, she was involved in an altercation in the lunchroom with a white employee. When McEwen complained of the altercation, defendant's plant manager apologized for the employee's behavior and told McEwen that he would take care of the situation. A few days later, which also happened to be prior to the expiration of McEwen's probationary period, defendant's plant manager informed McEwen that she was terminated. When asked whether she was being discriminated against, defendant's plant manager informed her that she was being terminated because of poor attendance.

Section 701 of the CRA, MCL 37.2701, provides, in part:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceedings, or hearing under this act.

To establish a prima facie case of retaliation, a plaintiff must prove "(1) that she was engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 311; 660 NW2d 351 (2003).

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[2] In particular, plaintiff Jennings argued that he was reluctant to apply for a die setter's job, stating at one point that it seemed as though "all black die setters got fired." However, plaintiffs presented no evidence in the form of names and dates to support this contention.

McEwen alleges that she was terminated because of her complaint regarding the altercation with the white employee. Assuming McEwen was engaged in a protected activity under the CRA, the element in dispute is whether there is a causal connection between McEwen's complaint and her subsequent termination. As evidence that the reason for McEwen's termination was her poor attendance during her probationary period, defendant submitted McEwen's attendance records for the period of time in question. The records indicate that on approximately eight to nine days, McEwen had been absent for a total of 24 hours, tardy for approximately 1.25 hours and sick for a total of 3.5 hours. In her deposition, McEwen admitted that she had missed "quite a few" days before the incident.

McEwen claims that when the manager fired her, he took out pictures of his biracial grandchildren and told her that he was not prejudiced. McEwen claims that this is proof of retaliation. However, this does not warrant a finding of retaliation. McEwen failed to present evidence that defendant's reasons for her termination were a mere pretext for discrimination. Thus, the trial court properly granted summary disposition to defendant with regard to this claim.

B

Plaintiff McEwen next argues on appeal that the trial court erred in granting summary disposition to defendant with regard to her discrimination claim. After her initial termination, McEwen was hired a second time by defendant in July 1999. McEwen was laid off in November 1999. Apparently, layoffs were based on seniority and because McEwen had only four months of seniority, she was laid off. McEwen was later called back to work, but she alleges that she was called back four weeks later than she should have been. She claimed that defendant's delay in calling her back to work was discriminatory.

There are three ways a plaintiff can establish that a defendant's stated nondiscriminatory reasons are pretexts for discrimination: (1) by showing the reasons had no basis in fact, (2) if they have basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if there were factors, by showing that they were jointly insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 566; 462 NW2d 758 (1990). "Disproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action." *Lytle*, *supra* at 175-176.

At the outset, we note that defendant admitted that McEwen was called back to work four weeks later than she should have been and it reimbursed her for the four weeks in question and restored her seniority. Defendant asserts that the delay in calling McEwen back to work was attributable to an error in computation. Apparently, defendant returned employees from layoff based on their seniority and defendant erroneously believed McEwen's seniority had expired. When it determined her seniority had not expired, it immediately called her back to work. McEwen counters that the fact that defendant has never before made such a mistake and the fact that McEwen was not called back to work until after the initiation of this suit undermine defendant's reason for failing to call McEwen back to work.

Assuming McEwen suffered an adverse employment action, she presented no evidence that defendant's reason for her late call back to work was a pretext for discrimination. McEwen presented no evidence that any prejudice on defendant's part played a role in the delay of calling

her back to work. In fact, McEwen herself admitted during her deposition that she thought her layoff exceeded her seniority. The trial court properly granted summary disposition with regard to this claim.

C

Finally, plaintiff McEwen argues on appeal that the trial court erred in finding that McEwen failed to establish a prima facie case of hostile work environment. For the same reasons that the trial court properly granted summary disposition in Docket No. 240889 with regard to the hostile work environment claim, we find the trial court properly granted summary disposition with regard to plaintiff McEwen. To the extent McEwen claims support for her hostile work environment claim based on her altercation in the lunchroom with the white employee, this incident is insufficient to establish a hostile work environment claim.

Affirmed.

/s/ Christopher M. Murray
/s/ Hilda R. Gage
/s/ Kirsten Frank Kelly